Supreme Court, U.S.
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In the

Supreme Court of the United States

ALBERT E. BIVINGS,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Circuit erred in issuing a Rule 36 decision in *Bivings v. Dep't of the Army*, given that Board Member Slavet's concurrence in *Laberge v. Dep't of the Navy* raised a significant question regarding the Federal Circuit precedence.

2. Whether the Federal Circuit decision is directly contrary to Congress' legislative mandate in the Whistleblower Protection Act of 1989.

3. Whether the Federal Circuit is directly contrary to the U.S. Supreme Court's interpretation of Congress' legislative mandate in the Whistleblower Protection Act of 1989.

4. Whether -- irrespective of the confusion caused by *Huffman* -- Petitioner's disclosure is protected under *Huffman*, *Marano*, *Watson*, and *Willis*.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the United States Court of Appeals for the Federal Circuit were:

(1) Petitioner Albert E. Bivings;

- and –

(2) Respondent Department of the Army.

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OPINIONS BELOW

The final decision of the Federal Circuit Court of Appeals in *Bivings v. Dep't of the Army* is reported at 2003 U.S. App. LEXIS 18873. The original decision is reported at 65 Fed. App. 731 (2003). The decision of the U.S. Merit Systems Protection Board is reported at 2002 M.S.P.B. LEXIS 709.

JURISDICTION

The Federal Circuit decision in *Bivings v. Dep't of the Army* was entered on June 6, 2003. A timely petition for rehearing en banc was denied on August 22, 2003. The ninety (90) day period in which the Petitioner must file his Petition for Writ of Certiorari with the honorable Court expires on November 20, 2003. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS

Federal Circuit Rule 36, Entry of Judgment – Judgment of Affirmance Without Opinion, states that "The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value... the decision of an administrative agency warrants affirmance under the standard of review in that statute authorizing the petition for review." Fed. Cir. R. 36.

The Whistleblower Protection Act of 1989 states that it is a violation of federal law to take or fail to take, or threaten to take or fail to take, a personnel action

with respect to any employee or applicant for employment because of:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

5 U.S.C. § 2302(b)(8). 'Whistleblowing' is defined as:

> . . . the disclosure of information by *an employee*, former employee, or applicant that the individual *reasonably believes* evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

5 U.S.C. § 1209.4 (b) [Emphasis supplied].

STATEMENT

Bivings v. Dep't of the Army presents decisions by the U.S. Court of Appeals for the Federal Circuit which directly oppose the Federal Circuit's case law, run contrary to Congress's legislative mandate in the Whistleblower Protection Act of 1989, and stand against the U.S. Supreme Court's interpretation of Congress's legislative mandate in the Whistleblower Protection Act of 1989.

In a similar case, a member of the Merit Systems Protection Board has already stated, "I believe that applying the clear statutory language in light of the WPA's purpose should lead to the conclusion that the appellant engaged in statutorily-protected whistleblowing." *Laberge v. Dep't of the Navy*, 91 M.S.P.R. 585 at 600. (Slavet, Board Member, concurring).

Indeed, this Court has already addressed the purpose of the Whistleblower Protection Act when it noted:

> a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. *See e.g., Rankin v. McPherson*, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); ... *Pickering, supra*, 391 U.S. at 569-571. Moreover, the government may certainly

> choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. *See e.g.*, Whistleblower Protection Act of 1989, *supra*.

Waters, 511 U.S. at 673-674. Communications within the chain of command, then, like those made by Petitioner, are exactly the opposite of the type of communications the court distinguished as not being of concern. Bivings' communications thus ought to receive protection under the Whistleblower Protection Act of 1989, in light of the high Court's definition of protected government employee speech.

In taking up this case, the honorable Court may be able to bring resolution to the conflicting precedent of the Federal Circuit rulings on the definition of protected disclosures. While Congress has clarified that any disclosure, not just some disclosures, ought to receive protection, and the honorable Court has made statements indicating that disclosures within an employee's chain of command should receive protection, Federal Circuit jurisprudence clashes with these interpretations of the law. Failing to incorporate *Marano v. Dep't of Justice*, 2 F.2d 1137, and *Watson v. Dep't of Justice*, 64 F.3d 1524, into the Federal Circuit's interpretation of *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, denies the efficacy of high Court precedence and stands in direct contradiction to *Waters*.

A. Factual Background

Petitioner Albert E. Bivings is a GS-13 Wildlife Biologist with Forces Command of the United States Army, headquartered at Fort McPherson. He is a subject-matter expert on wildlife resources and habitats. Bivings' duties include field trips to installations throughout the country. At these commands, he assists the local commands in achieving compliance with various federal statutory mandates. This "tiger team" approach of using outside experts to assist local commands is common throughout the U.S. Armed Services.

Tiger teams advise outside their normal chains of command on matters related to their subject matter expertise; Dr. Bivings, in this case, advised on matters outside his normal duties. His alleged disclosures to the staff judge at Fort McPherson concerned the Endangered Species Act of 1973 and the Sikes Act of 1949. These disclosures led to personnel actions on the part of the U.S. Department of the Army, including: (1) a two-day suspension; (2) a letter of reprimand; (3) two verbal reprimands; (4) a reduced performance award and a reduced performance rating; (5) a threatened reduced performance evaluation/award; and (6) a reduction in the size of his staff.

Dr. Bivings then filed an Individual-Right-of-Action (IRA) with the Merit Systems Protection Board (MSPB) concerning his alleged disclosures related to the Endangered Species Act of 1973 and the Sikes Act of 1949. The appeal was timely filed after the Office of Special Counsel (OSC) issued a January 8, 2001 letter to the appellant terminating its investigation and advising

him that he could file an appeal with Board. *See* 5 C.F.R. § 1209.5(a)(1). The MPSB concluded that Bivings' disclosures were not protected by the WPA. The Court of Appeals for the Federal Circuit issued an affirmance without opinion of the MSPB's judgment, pursuant to Fed. Cir. R. 36.

B. The Merit Systems Protection Board's Decision

The Merit System Protection Board concluded that the WPA did not protect Bivings' disclosures because they occurred during his normal job duties and through normal channels. The agency used *Huffman v. Office Personnel Mgmt.*, 263 F.3d 1341, to show that such disclosures do not receive protection under the WPA.

C. The Court of Appeals' Decision

The Court of Appeals issued an affirmance without opinion of the MSPB's decision, pursuant to Fed. Cir. R. 36.

REASONS FOR GRANTING THE WRIT

1. Whether the Federal Circuit erred in issuing a Rule 36 decision in Bivings v. Dep't of the Army, given that Board Member Slavet's concurrence in Laberge v. Dep't of the Navy raised a significant question regarding the Federal Circuit precedence.

Bivings maintains that *Huffman* must be read in line with *Marano* (1993) and *Watson* (1995), which although pre-dating either *Willis* or *Huffman*, recognize that a protected disclosure can be made as

part of one's official duties. *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001), *Meuwissen v. Dep't of Interior*, 234 F.3d 9 (2000), and the gloss imparted to *Huffman* case law by the remaining rules in *Willis v. Dep't of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993); and *Watson v. Dep't of Justice*, 64 F.3d 1524, 1526 (Fed. Cir. 1995).

In *Marano*, the court found that "the WPA ... applies to the situation where a government employee discloses information that is closely related to the employee's day-to-day responsibilities." *Marano*, 2 F.3d at 1142. Likewise, in *Watson*, the court held that despite the agency requirement to disclose misconduct and that the disclosure occurred through normal channels, it was protected.

Huffman, by contrast, established three categories of "normal duties" which establish the baseline for determination of whether a disclosure is protected: (1) disclosures an employee makes as part of his/her normal duties through normal channels (unprotected); (2) disclosures an employee makes as part of his/her normal assigned duties but outside of normal channels (protected); (3) disclosures an employee makes that are not part of the employee's assigned duties (protected). *Huffman*, 263 F.3d at 1352-1355. Exempting the first category from protection conflicts with the rules established under *Marano* and *Watson*. In error, the court reconciled the cases by describing the prior "normal duties" rulings in *Marano* and *Watson* as dicta. *See, Laberge*, 91 M.S.P.R. at P5 (Slavet, concurring). However, if the *Huffman* rule were applied to either *Marano* or *Watson*, these cases

would have held Marano's and Watson's disclosures unprotected. As such, the finding that WPA protection extended to one's official duties is not mere dicta, but rather provides essential support to both the Marano and Watson holdings.

Member Slavet's concurrence explains that it is questionable whether these cases can be reconciled and that the controlling Federal Circuit precedent remains unclear. *See, Laberge,* 91 M.S.P.R. 585 (Slavet, concurring). The Federal Circuit in its affirmance failed to clarify Federal precedent. The honorable Court in taking this case can bring closure to the chaotic state of precedent related to whistleblower protection under the WPA.

2. Whether the Federal Circuit erred in issuing a Rule 36 decision in Bivings v. Dep't of the Army, given that Board Member Slavet's concurrence in Laberge v. Dep't of the Navy raised a significant question regarding the Federal Circuit precedence.

It is entirely proper to consider subsequent legislative action, or the interpretation which the legislature subsequently places on a statute, to determine a statute's meaning. 73 Am. Jur. 2d *Statutes* § 94. "These legislative interpretations are in fact entitled to great weight in resolving ambiguities and doubt." *Id.* Lawmakers have repeatedly expressed frustration over the courts' refusal to strictly enforce the WPA. Congress expressed its intent to change the courts' behaviors when it amended the Civil Service Reform Act (CSRA) of 1978, 5 U.S.C. § 2302, and the

WPA in 1989 and 1994.[1] In addition, Subcommittee Chairman Frank McCloskey's statements at the floor debate carry some weight, as McCloskey sponsored the bill. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 201 (1983).

The CSRA, 5 U.S.C. 2302, and the major amendment to that law, the Whistleblower Protection Act ("WPA") of 1989, 5 U.S.C. § 1221, are Congress's mandates to protect employee whistleblowers. The panel decision by the Federal Circuit runs directly contrary to this mandate as evidenced by legislative history.

The WPA modified the CSRA in several significant ways. First, it gave employees expanded personal and subject matter jurisdiction for MSPB hearings. Whistleblowers could now defend themselves without having to depend on the Special Counsel's willingness to litigate, as they had to under the CSRA. Also, under the WPA, any listed personnel action in § 2302(b)(8) is subject to a board hearing, not just the more severe disciplinary actions that fell under the old law. The WPA gave employees full due process rights against "lesser" forms of harassment such as reprimands and removal of duties.

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[1] By the late 1980s, Congress recognized that the CSRA's "well-intentioned efforts to protect whistleblowers ha[d] thus far had little effect," S. Rep. No. 100-413, at 5 (1988). Senator Levin, in response to the MSPB's finding that the fear of reprisal for whistleblowing had doubled since the CSRA, stated, "These statistics are a clear sign that the system has not worked as intended and needs to be improved." 134 Cong. Rec. 19,981 (1988).

The WPA also expanded the scope of protected disclosures. Under the CSRA, only disclosures of an illegality or a specified misconduct were protected. The OSC, the MSPB, and the Federal Circuit had all interpreted the CSRA to protect only significant whistleblowing disclosures and to protect them only on a discretionary basis. The WPA amended 5 U.S.C. § 2302(b)(8) by substituting "*any* disclosure" (emphasis added) for "a disclosure." The Senate Committee on Governmental Affairs cautioned the MSPB and the courts to avoid the bureaucratic tendency to over-define the nature of a disclosure and thereby exclude communications that Congress intended to protect.[2]

The WPA amendments in 1989 tried to ensure a process that would encourage federal employees to disclose evidence of waste, fraud, and abuse of authority. Yet Congress had to make further amendments in 1994 because "the WPA ha[d] created new reprisal victims at a far greater pace than it [had] protected them." H.R. Rep. No. 103-769, at 12 (1994).[3]

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[2] S. Rep. No. 100-413, at 13 (noting that "[t]he Committee intends that disclosures should be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. [The Senate bill] emphasizes this point by changing the phrase 'a disclosure' to any 'disclosure' in the statutory definition.)

[3] *See* 5 U.S.C. § 2302(a)(2)(A)(xi)(1994) (increasing subject matter jurisdiction for whistleblowers by adding a catchall clause the effectively banned discrimination through "any other significant change in duties, responsibilities, or working conditions."); 140

The legislative history rejected numerous MSPB and Federal Circuit decisions as illegal under the WPA because they "represented a steady attack on achieving the legislative mandate for effective whistleblowing protection." H.R. Rep. No. 103-769, at 17.[4]

Congress expressed frustration that it could not clarify or expand the scope of protected disclosures any further than it already had. It stated, "Perhaps the most troubling precedents involve the [MSPB's] inability to understand that 'any' means 'any.' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind." *Id.* at 18. So a "protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction on time, place, motive or context." 140 Cong. Rec. H11419 (statement of Rep. McCloskey).

Congress's expansion of the Act to include any disclosure allows the WPA to embrace Petitioners' disclosures. Disclosures within the chain of command receive protection under the legislation's classification of "any" disclosures as protected. *103 Stat. 16.* MSPB Member Slavet has agreed that the legislative language

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Cong. Rec. H11419 (1994) statement of Rep. McCloskey, (noting that"[t]his personnel action [was] intended to include any harassment or discrimination that could have a chilling effect on whistleblowing.")

[4] *See id.* (noting that since FY 1991 whistleblowers had only won 5 percent (5%) of decisions on the merits.)

and intent require "any" disclosure to include those within the chain of command, within the scope of normal duties.[5] Although Member Slavet agreed with the majority that *Huffman* required the Court to define Laberge's disclosures as unprotected, the Judge enunciated her objection to a conclusion necessitated only by prior precedent when that precedent conflicts with the letter and intent of the statute itself. In *Ganski v. Dep't of the Interior*, the majority of the MSPB ruled that a Park Superintendent did not engage in protected disclosure when the Complainant complained to a second-line supervisor of gross mismanagement within the National Park Service. *Ganski v. Dep't of the Interior*, 83 M.S.P.R. 301 (1999). Slavet dissented, interpreting the legislative history of the WPA to indicate that "the plain language of ... [the WPA] ... leaves no room for the majority's holding that some disclosures of violations of law, rule, or regulation are not protected." *Id.* at 7.

Although Slavet concurred with the judgment in *Huffman*, then, her dissent in *Ganski* indicates support for protection of Laberge's disclosure, and whistleblowers in like of similar circumstances – such as Albert E. Bivings.

Any reasonable reading of the WPA's legislative history will reveal Congress's intent to expand protection and to make that protection meaningful. The

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[5] *Laberge v. Dep't of the Navy*, 91 M.S.P.B., p. 5 (Board Member Slavet, concurring) (noting that "[a]pplying the clear statutory language in light of the WPA's purpose should lead to the conclusion that the appellant engaged in statutorily-protected whistleblowing.")

amendments made since the original passage of the CSRA in 1978 have expanded personal and subject matter jurisdiction for employees, lessened the burden of proof on whistleblowers, and increased the scope of activities that are afforded whistleblower protection. These changes, which further encourage whistleblowing and afford it increased protections, are evidence that our lawmakers deem whistleblowing a necessity and a beneficial element of our society.

The WPA has many ambiguities and its meaning has been tortured in the courts. Thus, the Court should consider the legislative history before it newly interprets the Act.

3. Whether the Federal Circuit is directly contrary to the U.S. Supreme Court's interpretation of Congress' legislative mandate in the Whistleblower Protection Act of 1989.

Since 1982, the United States Supreme Court has granted only twenty-one (21) petitions for writ of certiorari filed on cases before the U.S. Court of Appeals for the Federal Circuit. The high Court has never issued an opinion on a case involving the Whistleblower Protection Act of 1989, as that act has been interpreted by the Federal Circuit. Nonetheless, the high Court has detailed the exact relationship between the federal employee, the WPA, and the First Amendment's protection of employee speech. Unless the Federal Circuit's case law includes *Marano* and *Watson*, as that law could be read through *Huffman*,

the Federal Circuit directly contradicts high Court precedence in *Waters v. Churchill.*[6]

When fashioning a restriction on speech – such as the *Huffman* opinion – the federal Government may craft restrictions broader than those permitted in the private work place. In crafting such restrictions, however, the high Court underscores the external direction of these regulations – as in dealing with the public – or the internal necessity, as in maintaining discipline. What the high Court does not anticipate is the Federal Circuit's use of restrictions on the Whistleblower Protection Act of 1989 to curtail the free speech of federal employees, acting pursuant to their duties, and revealing failures in the assessment, inspection and compliance activities of the U.S. Government. Yet the Federal Circuit promotes a regime of just such restrictions in what the Federal Circuit has encouraged through its precedent in *Huffman.*

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[6] *Waters v. Churchill*, 511 U.S. 661, 671-672 (1994), stating that "...the government as employer indeed has far broader powers than does the government as sovereign *See e.g., Pickering*, 391 U.S. at 598; *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 564, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973)...even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. The First Amendment demands a tolerance of "verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of ... the process of open debate.' *Cohen v. California*, 403 U.S. 15, 24-25, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work."

Here, in the high Court's precedence, is case law affirming that discipline and action within one's chain of command are the hallmarks of the federal concern with speech in its own operations. The ill-guided informing of individuals outside the chain of command, though promoted by *Huffman* absent the gloss of *Marano* and *Watson*, goes against the aims endorsed by High Court precedent. Employees like Bivings, who are part and parcel of an advising and compliance process, are the type of employees the high Court encourages.

Communications within the chain of command are exactly the opposite of the type of communications the court distinguished as unprotected. Employees who abide by the traditional hierarchy of federal service are precisely the ones who ought to be encouraged. By contrast, the disruptive employee – one acting now under *Huffman* as it is not informed by *Watson* and *Marano* – fit the profile of the allowable restriction in *Waters*.[7]

Waters provides the juridical linkage between the First Amendment concerns, *supra*, and the Whistleblower Protection Act of 1989.[8] The WPA is

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[7] *Waters*, 511 U.S. at 672, noting that "though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing. *Cf. Branti v. Finkel*, 445 U.S. 507, 518, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980)."

[8] *Id.* at 673-674, noting that "we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference

supposed to provide the balance between employee speech rights and the tolerable level of 'disruption' permitted under *Pickering*. By excluding *Marano* and *Watson* from the gloss informing *Huffman*, the Federal Circuit is denying the efficacy of high Court precedence and directly contradicts *Waters*.[9]

As the opinion in *Waters* finishes the relevant discussion: "The key to First Amendment analysis of

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with the agency's operation ... One could make a respectable argument ... that high officials should allow more public dissent by their subordinates; *see* ... Whistleblower Protection Act of 1989, 103 Stat. 16, ... But we have given substantial weight to government employees' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential. *Compare Letter Carriers, supra*, at 566-567, *with Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989); *Texas v. Johnson*, 491 U.S. 397, 409, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)."

[9] *Waters*, 511 U.S. at 674, noting that "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. *Pickering, supra*, 391 U.S. at 572. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. *See Rankin v. McPherson*, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); ... *Pickering, supra*, 391 U.S. at 569-571. Moreover, the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. *See* Whistleblower Protection Act of 1989, *supra*.

government employment decisions, then, is this: The government's interest is in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Huffman* does not guide the conduct of disclosures under the Whistleblower Protection Act of 1989 in this manner. *Huffman* contradicts *Waters*.

4. *Whether, irrespective of the confusion caused by Huffman, Petitioner's disclosure is protected under Huffman, Marano, Watson, and Willis.*

Irrespective of the confusion in place as a result of *Huffman*, Bivings' disclosures still qualify as protected under the non-contradictory guidance proffered by the Federal Circuit in *Marano*, *Watson*, *Willis*, and *Huffman*. Taken as a whole, disclosures are protected if they (1) are made outside of normal duties or normal channels; (2) are issued to persons in a position to correct the alleged wrongdoings; (3) are done so at risk to one's job security for the advancement of the public good. In *Willis*, Appellant Willis failed because he did not show an intent to raise the issue to persons in a position to correct the alleged wrongdoings nor did he risk his job security for the advancement of the public good by disclosing abuses by government personnel. *See, Willis*, 141 F.3d 1143, 1444. By contrast, Bivings' disclosures meet each of these criteria even where Willis' disclosures failed.

Bivings' job is to provide "assistance and guidance" and not to provide environmental or labor rule, law, and/or regulation enforcement. The reading of *Huffman* insofar as it narrows the definition of communications below that of 'any' disclosure (as defined by Congress) is, with respect to this case, moot in that it was not Dr. Bivings' duty to communicate or act upon infractions of labor and environmental laws. *Huffman*, 263 F.3d at 1341, 1344, 1349, 1351-53.

Bivings' *Letter of Reprimand* states that Bivings' communication was beyond the scope of his employment. Dr. Bivings' job description, agreed upon by Mike Frnka the author of the reprimand, does not describe a duty to provide oversight, enforcement or compliance related to the forestry program or fire management. In fact, the FORSCOM Staff includes a forester, a GS-13, who is responsible for the forestry program which, in most DOD installations in the southeastern United States, includes fire protection outside the cantonment area and the responsibility for prescribed (intentional) burning and therefore is responsible for communications Bivings made beyond the scope of his employment.

Bivings' job description further does not "assign the task of investigating and reporting wrong-doing" related to the Endangered Species Act, placing his communications to Mr. Tom Fry outside the exceptions to protection in *Huffman*. Id at 1352.

Huffman cannot be construed to restrict disclosures merely because individuals are involved with activities related to the disclosure as part of their normal duties; to do so would invalidate any disclosure,

especially by employees in a managerial professional staff position exposed to many levels of activity, since in order to become aware of a transgression, one must be exposed to the transgression through his/her job activities. The fact that Bivings became aware of the transgressions as a result of his job duties does not preclude protection. *Huffman* should instead only be interpreted to apply to situations where the specific disclosures themselves are a part employee's normal work assignment. *See Comito v. Dep't of the Army*, 90 M.S.P.R. 58, PP10-11 (2001), *Sutton v. Dep't of Justice*, 94 M.S.P.R. 4 (2003), P11.

Further, Bivings' disclosures were outside normal channels. Bivings' situation is similar to that of Complainant Eugene Johnson two years ago:

> In determining whether these disclosures are protected, however, it is also necessary to examine the context in which they were made, considering that the appellant's duties as a Facilities Technical Specialist required him to report suspected contract irregularities to agency authorities. IAF [**11] (W-1), Tab 1. In *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit sought to clarify its position as to whether reports of misconduct are covered by the WPA if the disclosures are part of the employee's normal duties. *Id.* at 1352. The court found that, if an employee who is responsible for reporting wrongdoing

> goes outside of the chain of command because he feels that those officials are "unresponsive," his disclosures are protected. *Id.* at 1354.

Johnson v. Health and Human Services, 2002 MSPB LEXIS 1136 at 11. Even if Bivings were responsible to report violations of environmental and labor law, his doing so outside the chain of command constitutes a protected disclosure. Bivings made disclosures related to the Sikes Act to the Staff Judge Advocates' Office at Fort McPherson. Bivings is not under the supervision, direct or otherwise, of the Judge Advocates' Office. Bivings also sent an e-mail to all of the biologists at each Army installation, advising them that the Army could not contract out their positions and that such action would constitute a violation of the Sikes Act.

Bivings' numerous disclosures to the Staff Judge Advocates' Office is most analogous to *Larson* (2001) where the court recognized that disclosures to an internal safety office for the purpose of review of the conduct of the whistleblowers' organization constituted a protected disclosure under the WPA. *Larson v. Dep't of the Army*. 260 F.3d 1350, 1353 (Fed. Cir. 2001). Here again the Honorable court could bestow guidance relating to the ambiguity of the Federal Circuit, unresolved by a Rule 36 decision in this case.

It is well established that mere internal policy discussions and disagreements do not constitute protected disclosures. Yet, the *Letter of Reprimand* here clearly distinguishes Bivings' disclosure from mere internal discussion or debate. Not only did the disclosure result in disciplinary retaliation (not an event

normally resulting from internal disagreement or discussion relating specifically to one's enumerated job duties) the language of the reprimand indicated that the disclosures "constitute[d] a violation". Bivings communicated direct concerns regarding a violation of law; he didn't merely engage in discussion as to the merits of the law or compliance with it.

The need for the Honorable court to clarify what constitutes protected disclosures through "normal channels" is especially evident within the context of this case, in which the Petitioner is an employee of the Department of Defense ("DOD"). Surely, *Huffman* should not be construed as forbidding any disclosure within an individual's chain of command. To do so would forbid any disclosure by a DOD employee that other than those made through highly public media. Given the sensitive nature of DOD information, this consequence – frustrating employee reliance on the chain of command structure fundamental to DOD operations – is undesirable. To avoid such a debacle, this court should seize the opportunity to clarify *Huffman* by bringing it more in line with the precedents of *Marano*, *Watson*, and *Willis*, protecting disclosures to individuals not directly responsible for the wrongdoing or individuals in a position able to rectify the wrongdoing.

Bivings' disclosures also fulfill the two litmus tests established in *Willis*. First, Bivings' various disclosures were intended to correct wrongdoings and he believed that, even when directed toward the wrongdoers themselves, his disclosures were directed toward those in the best situation to remedy the wrongdoing. As in *Johnson*, when Bivings felt his

supervisors were "unresponsive," he notified the Staff Judge Advocates' Office at Fort McPherson outside his chain of command which he believed would be capable of rectifying the wrongdoing. *Johnson*, 2002 MSPB LEXIS at 11.

Second, The *Letter of Reprimand* establishes that Bivings disclosed at the risk to his job in order to further the public good. Here the facts are similar to *Price v. NASA*, 83 M.S.P.R. 661 (1999). In *Price*, the appellant disclosed to supervisors whom he believed were in a position to rectify wrongdoing or forward his concerns to higher authorities who were in a position to remedy the wrongdoing. The court found that appellant could have performed his job duties with impunity without disclosure and placed his job security at risk by pursuing disclosure for the public good. As such, the court found the disclosure protected. Bivings' situation resembles that of Price, and therefore his disclosure should receive similar protection.

The Honorable court can therefore rectify the erroneous lower court application of the rules established in *Marano*, *Watson*, *Willis*, and *Huffman* in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Public Employees for
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02-3353

United States Court of Appeals for the Federal Circuit

ALBERT E. BIVINGS,
Petitioner,

V.

DEPARTMENT OF THE ARMY,
Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD In CASE NO(S). AT1221010421-W-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM (LOURIE, RADER, and DYK, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED JUN 6 2003

JAN HORBALY, CLERK

DOCKET NUMBER AT-1221-01-0421-W-1

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

ALBERT E. BIVINGS,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: JUN 26 2002

Daniel P. Meyer, Esquire, Washington, D.C., for the appellant.

Robin B. Allen, Esquire, Ft. McPherson, Georgia, for the agency.

BEFORE

Susanne T. Marshall, Acting Chairman
Beth S. Slavet, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that

establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. See Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 77023). You may read this law as well as review other related material at our web site, http://mspb.gov.

FOR THE BOARD:
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

DOCKET NUMBER AT-1221-01-0421-W-1

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

ALBERT E. BIVINGS,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: JUN 26 2002

Daniel P. Meyer, Esquire, Washington, D.C., for the appellant.

Robin B. Allen, Esquire, Ft. McPherson, Georgia, for the agency.

BEFORE

Margaret S. Cunningham
Administrative Judge

INITIAL DECISION

INTRODUCTION

On March 13, 2001, the appellant filed an Individual-Right-of-Action (IRA) appeal with the Board's Atlanta Regional Office from the following actions taken against him by the agency: (1) a 2-day suspension which was effective August 28, 2000; Agency File, Tab 4b. (2) a

letter of reprimand dated December 10, 1998; Agency File, Tab 4t. (3) two verbal reprimands; (4) a reduced performance award and reduced performance rating in June 1999; (5) a threatened reduced performance evaluation and award in June 2000; and (6) a reduction in his staff size. The appeal was timely filed after the Office of Special Counsel (OSC) issued a January 8, 2001 letter to the appellant terminating its investigation and advising him that he could file an appeal with the Board. See 5 C.F.R. § 1209.5(a)(1). The appellant alleges that the above personnel actions were taken against him in retaliation for his whistleblowing activity which will be discussed below.

The hearing the appellant requested was held on July 25, 2001, in Atlanta, Georgia. After considering the evidence, I find that corrective action is not warranted because the appellant did not make disclosures protected under 5 U.S.C. § 2302(b)(8) and thus failed to state a claim upon which relief can be granted. See Meuwissen v. Department of Interior, 234 F.3d 9, 12 (Fed. Cir. 2000); see also Spruill v. Merit Systems Protection Board, 978 F.2d 697, 686-89 (Fed. Cir. 1992).

BURDENS OF PROOF

To establish Board jurisdiction over this IRA appeal, the appellant must prove, by preponderant evidence, that he has exhausted his administrative remedies before the OSC and must make "non-frivolous allegations" that: (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. §

2302(a). See Yunus v. Department of Veterans Affairs, 242 F.3d 1367, 1371-72 (Fed. Cir. 2001). The above test is the one set forth by the United States Court of Appeals for the Federal Circuit (Federal Circuit).

In Shriver v. Department of Veterans Affairs, MSPB Docket No. DC-122101-0043-W-1, slip op. at paragraphs 4-6, (Aug. 9, 2001), the Board noted that its jurisdictional test, as set forth in Geyer v. Department of Justice, 63 M.S.P.R. 13, 16-17 (1994), differs from that of the Federal Circuit's test inasmuch as it does not require that an appellant establish that the disclosure was a contributing factor in the agency's decision to take, or fail to take, a personnel action before jurisdiction can be found.

In the instant case, it matters not which test one applies in light of my finding that the appellant failed to meet the first prong of either test since he did show that he made disclosures protected under 5 U.S.C. § 2302(b)(8).

ANALYSIS AND FINDINGS

The personnel actions.

During the processing of this appeal, I made a number of rulings concerning the alleged personnel actions. They were summarized on the record during the hearing. The 2-day suspension beginning on August 28, 2000, is clearly a personnel action as that term is defined at 5 U.S.C. § 2302(a)(2)(iii). The December 10, 1998 letter of reprimand is also deemed a personnel action under 5 U.S.C. § 2302(a)(2)(iii); see also Johnson v. Department of Health and Human Services, 87

M.S.P.R. 204, 209 (2000). However, during the hearing, I noticed that the letter of reprimand was to remain in the appellant's personnel file for only a 1-year period. It was removed from his records in December 1999. Accordingly, since it is no longer a viable personnel action, there is no corrective action that can be ordered with respect to the written reprimand and the issue of the reprimand as a personnel action has been rendered moot and will not be considered. See Hoever v. Department of the Navy, 70 M.S.P.R. 386, 388-89 (1996).

The two verbal reprimands that the appellant challenges are not considered personnel actions and thus were rejected during the prehearing conference. See Johnson v. Department of Health and Human Services, 87 M.S.P.R. at 209. The reduced performance award and reduced rating in June 1999 constitute personnel actions under 5 U.S.C. § 2302(a)(2)(A)(viii). The appellant also raised the same issue with respect to his June 2000 performance evaluation and award. However, he did not take the issue to the OSC after he received the evaluation and award. He raised the issue to the OSC claiming that the agency had threatened to reduce his evaluation and award. Accordingly, the threatened action is a personnel action within the meaning of the statute.

Finally, the appellant claims that his staff size was reduced. The agency presented evidence that the appellant was not a supervisor and thus did not have any subordinates. Accordingly, his staff could not have been reduced. I thus find that this last issue does not constitute a personnel action.

In sum, the 2-day suspension, the reduced performance evaluation and award for 1999, and the allegedly threatened reduction for 2000 constitute personnel actions in this case. The balance of the claims were rejected for the reasons stated above.

The disclosures.

The appellant's disclosures fall into two major categories. One involves his interpretation of the Sikes Act which, in his view, prohibits the contracting out of natural resources management positions. The second involves his alleged disclosures that Fort Stewart and Fort Bliss were violating the Endangered Species Act.

In all, the appellant identified 15 alleged disclosures. Appeal File; Tab 18. Prior to the prehearing conference he withdrew alleged disclosures 2, 3, 4, and 11. And, during the prehearing conference, I rejected the Sikes Act issues as protected disclosures for the reasons set forth below. Those involve alleged disclosures 5, 6, 7, and 8. Appeal File, Tab 18.

The alleged Sikes Act disclosures.

The appellant is a Wildlife Biologist; GS - 13, with (FORSCOM) at Fort McPherson, Georgia. He is a subject matter expert on wildlife resources and habitats. Part of the appellant's job includes traveling to FORSCOM installations in the region and assisting them in achieving compliance with various wildlife management statutes. The FORSCOM Environmental Branch where the appellant works is not responsible for enforcing the wildlife management statutes, but for lending expertise to the installations. The agencies that

regulate the wildlife resources management carried out by installations are the Fish and Wildlife Service of the Department of Interior and the National Marine Fisheries Service of the Department of Commerce.

The Sikes Act is codified at 16 U.S.C. § 670a et seq. It pertains to conservation programs on government lands. One of the provisions of the act requires that each military department prepare and implement an integrated natural resources management plan for each military installation. Section 670a(d) of the Act provides that, with respect to the implementation and enforcement of integrated natural resources management plans, neither Office of Management and Budget Circular A-76 nor any successor circular thereto applies to the procurement of services that are necessary for that implementation and enforcement.

Most military departments conduct what are called A-76 (CA) reviews or studies to determine which, if any, positions can be contracted out to nongovernment entities to achieve the most efficient organization (MEO). The studies do not always result in duties and/or positions being contracted out. According to the record, on October 29, 1997 the appellant sent an e-mail to Lt. Col. David Howlett in the Staff Judge Advocate's Office (SJA). Appeal File, Tab 18. In his e-mail, the appellant noted that he was aware of CA studies being conducted on natural resources positions and he requested a legal opinion concerning the applicability of the Sikes Act. He then offered the opinion that, if some positions must be contracted out, at least the installation biologist should be a Federal civilian employee.

Lt. Col. Howlett responded to the e-mail on October 31, 1997. Appeal File, Tab 18. In his response, after offering an explanation of the statute, Lt. Col. Howlett wrote: "Bottom line: we won't contract out inherently governmental responsibilities, unless we can get professionals in Interior or the state to do it through a cooperative agreement." In his explanation, he also indicated that certain labor-intensive activities could be performed effectively by the private sector.

During the following years, agency officials debated the interpretation of what constitutes "inherently governmental responsibilities" and there was some difference of opinion on the meaning of the Sikes Act and how if fit into the provisions of AR 200-3. Appeal File, Tab 18. Some were of the opinion that no positions could be contracted out and others believed some of the positions could be contracted out. There were exchanges concerning whether non-decision making positions could be contracted out. In the meantime, the agency continued with its CA studies to determine which, if any, positions could be contracted out and identified some positions at grades below a GS-13.

The appellant claimed on appeal that he made four protected disclosures with respect to the Sikes Act. He contends that his October 29, 1997 e-mail to Lt. Col. Howlett constituted a protected disclosure. I ruled that it did not inasmuch as the appellant was merely asking for a legal opinion on the applicability of the Sikes Act to CA studies and injected his reading of the statute.

On October 8, 1998, the appellant sent an e-mail to all the biologists at Army installations advising them that the agency could not contract out their positions and

that if it did; that would constitute a violation of law and would be appealable to the Merit Systems Protection Board.

In two separate meetings, one at Fort Bragg, North Carolina, and one that I presume took place in Atlanta, the issue of CA studies came up. The appellant on both occasions became vociferous and argued that it would be illegal to contract out any positions involving natural resources responsibil ities.

The above three alleged disclosures do not constitute whistleblowing and I ruled prior to the hearing that I would not consider them as such for several reasons. First, there was ongoing dialogue at the agency concerning the interpretation of the Sikes Act. And, in September 1998, the appellant was sent an e-mail setting forth the FORSCOM position on the CA studies. Appeal File, Tab 22, Exhibit D. He was thus fully apprised of the official agency position on the issue. The appellant, however, saw no gray areas and was quick to voice his opinion. This is really nothing more than a policy debate with the appellant on one side and certain agency employees on the other. Such differences of opinion and disagreement regarding policy do not constitute whistleblowing. See Meuwissen v. Department of Interior, 234 F.3d at 13; see also Willis v. Department of Agriculture, 141 F.3d 1139, 1143 (Fed. Cir. 1998). Moreover, the appellant was not disclosing anything that was not a matter of general knowledge. He was merely arguing with others during meetings concerning the CA issue. And, finally, I note that the agency was merely conducting studies to determine the feasibility and propriety of contracting out. The

appellant certainly could not have had a reasonable belief that the mere conducting of studies was illegal.

For the foregoing reasons, I did not accept alleged disclosures 5, 6, 7, and 8 as non-frivolous allegations of whistleblowing and will not discuss these issues further.

The alleged Fort Stewart disclosures.

The appellant made nonfrivolous allegations that disclosures 1, 9, and 10 constituted whistleblowing. Appeal File, Tab 18. However, after hearing the evidence concerning these alleged disclosures, I find that they do not rise to the level of whistleblowing allegations for the reasons set forth below. All of the disclosures occurred at Fort Stewart, Georgia, in April of 2000, and involve the same issue.

Fort Stewart is the home of the red-cockaded-woodpecker (RCW), an endangered species. The RCW lives in long-leafed pines on the military installation. In 1992, Fish and Wildlife issued what is called a Jeopardy Biological Opinion (JBO) in which it concluded that the RCW was in danger of losing its habitat at Fort Stewart. Appeal File, Tab 16, Exhibit 2. According to David Flemming, Ecological Services Supervisor for Fish and Wildlife, that agency issues between 10 and 20 JBOs per year.

The 1992 JBO that was issued to Fort Stewart regarding the RCW provided for what is known as "reasonable and prudent alternatives". Appeal File, Tab 16, Exhibit 2. One of the alternatives called for a prescribed burn plan with a goal of a 2-4 year growing

season burn cycle in the RCW habitat. Id. In essence, Fort Stewart was to burn approximately 80,000 acres of property in order to make room for the long-Leafed pines to thrive. Prior to 1992, Fort Stewart was burning off about 46,000 acres per year.

In 1996, the agency issued army wide RCW guidelines. Both the 1992 JBO and the 1996 guidelines implement the Endangered Species Act. During the second week of April 2000, the appellant and a team of other subject matter experts were at Fort Stewart to conduct an Environmental Compliance Assessment System (ECAS) review. The ECAS is an internal review process established by the DoD. The purpose of the ECAS is to identify compliance issues so that experts such as the appellant can assist the installation in achieving environmental goals. The 2000 ECAS at Fort Stewart was conducted by Dr. Paul Vohs, a subcontractor that the appellant had brought in.

Thomas Fry is the Supervisory Environmental Engineer at Fort Stewart. On April 11, 2000, Fry and several of his subordinates were in Fry's office participating in a meeting. According to Fry, the appellant walked in and started a conversation about the burn program. Fry testified that the appellant's tone was confrontational. Fry had been working on an Integrated Natural Resource Management Plan (INRMP) for the year. The appellant attacked the plan and began arguing that Fort Stewart was not in compliance with the JBO and the 1996 armywide RCW guidelines. Fry tried to explain that Fort Stewart was in compliance because the 1996 revised guidelines allow the 3-year burn cycle to be stretched to a 5-year burn cycle with the concurrence of Fish and Wildlife

authorities. The appellant disagreed and told Fry that he would not approve Fry's INRMP as it was drafted because his interpretation of the JBO and the 1996 guidelines required a 3-year burn cycle. Fry further testified that this confrontation took place in his office while he was having a meeting with his subordinates and he felt that the appellant was being unprofessional. He also testified that the appellant made a comment to the effect that he did not want to have Fry fired but Fry was not complying with the JBO, the guidelines, and the Endangered Species Act.

Later that day, Fry was on a telephonic conference with several individuals including Michael Frnka, the appellant's supervisor. During the conference, Fry made the comment to Frnka that perhaps he needed to come to Fort Stewart. Frnka did so and was apprised of the appellant's confrontational and unprofessional attitude toward Fry. Fry requested that FORSCOM not send the appellant to Fort Stewart again. After obtaining statements from those individuals who were present in Fry's office during the discussion with the appellant. Frnka proposed a 5-day suspension. The basis for the proposal was the appellant's discourteous and disruptive behavior. After affording the appellant an opportunity to respond, Col. Frank Ellis, the FORSCOM Engineer, mitigated the proposed 5-day suspension to a 2-day suspension. Ellis testified that he reduced the suspension because he believed the appellant did not intend to be hostile but that he sometimes becomes passionate about conservation issues.

The appellant claims that he made 4 protected disclosures in connection with this confrontation

because he told Fry that Fort Stewart was in violation of the JBO, the RCW guidelines, and the Endangered Species Act. He also claims that the ECAS survey was an additional disclosure inasmuch as Dr. Vohs found Fort Stewart not in compliance with the burn program and the appellant concurred in that finding.

For a number of reasons, I find that the appellant's alleged disclosures were not protected. First, as I found with respect to the CA issue discussed in the preceding section, the appellant and Fry disagreed on the interpretation of the RCW guidelines. This was nothing more than a policy dispute with the appellant stating that the installation was not in compliance with the bum program and with Fry stating that the guidelines were being complied with. Moreover, the appellant did not identify with any specificity what provisions of the guidelines or the Endangered Species Act were not being complied with.

Second, I note that the appellant did not "disclose" anything that was not generally known. As set forth above, the Fish and Wildlife Agency is responsible for regulating compliance with environmental laws and guidelines. And, according to Fry and Frnka, the Fish and Wildlife representative at Fort Stewart was well aware of the number of acres that Fort Stewart was burning and did not have a problem with that number in light of the fact that the Fort Stewart has experienced a 10-year drought; that safety of troops while on training exercises is an issue to be considered; and that two major roads go through Fort Stewart and indiscriminate burning could have safety repercussions. The Court of Appeals for the Federal Circuit has held that disclosure of information that is already generally

known cannot constitute whistleblowing. Meuwissen v. Department of Interior, 234 F.3d at 12-13. Since the record reflects that the Fish and Wildlife regulators were well aware of Fort Stewart's actions with respect to burning, the appellant's disclosures to Fry are not protected

Third, it is part of the appellant's job responsibilities to identify areas where compliance could be improved and to assist installations in making improvements. That the appellant may have told Fry that he was not in compliance, and that he may have concurred in the ECAS findings concerning the RCW burning program, his job required that he do so. And, the Court of Appeals for the Federal Circuit has held that the mere performance of "required everyday job responsibilities" cannot constitute protected disclosures because an employee "cannot be said to have risked his personal job security by merely performing his required duties." Huffman v. Office of Personnel Management, Docket No. 00-3184, slip op. at 14 (Fed. Cir., Aug. 15, 2001).

Finally, although I do not doubt the appellant's sincerity and zeal in believing that Fort Stewart was not complying, I note that just one month after the April 11, 2000 incident, the appellant sent an e-mail to Col. Ellis and Michael Frnka in which he stated that Fort Stewart had a "world class program" in the RCW recovery area and he cited statistics to support that statement. Agency File, Tab 41. In that e-mail, the appellant also noted that, in 1997, Fort Stewart won a DoD Natural Resources award for best installation in connection with the RCW program. Id. This e-mail flies in the face of the appellant's alleged disclosure that Fort Stewart was not complying with the guidelines

and was not making efforts to increase the RCW habitat. A reasonable person who is aware of the accolades that Fish and Wildlife personnel showered on Fort Stewart could certainly not have believed that Fort Stewart was not complying with the guidelines or the Endangered Species Act.

Having found that the appellant's disclosures concerning the Fort Stewart RCW recovery effort were not protected, I conclude that the appellant has failed to state a claim upon which relief can be granted and therefore his request for corrective action must be denied.*

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

Margaret S. Cunningham
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on October 4, 2001 unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which

the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no Later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or handdelivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

FOOTNOTES

* During the prehearing conference, I rejected disclosures 12, 13, and 14 because they involve the appellant's comments to both Frnka and Col. Ellis that they were violating 5 U.S.C. § 2302 by proposing his suspension. These disclosures occurred after the suspension was proposed. Moreover, he claims that his request for corrective action to the OSC constituted whistleblowing. I rejected that claim also inasmuch the filing of a claim with the OSC constitutes 5 U.S.C. § 2302(b)(9) activity and is thus not whistleblowing pursuant to 2302(b)(8). In any event, the filing with the OSC took place after the personnel actions were taken. The appellant also claims he made disclosures between 1993 and 1997 to Fort Bliss officials in which he

critiqued their Aplomado Falcon recovery efforts. Since there was virtually no evidence presented at the hearing concerning these alleged disclosures, I cannot find that they constitute protected activity.

02-3353

United States Court of Appeals for the Federal Circuit

ALBERT E. BIVINGS,
Petitioner,

V.

DEPARTMENT OF THE ARMY,
Respondent.

ORDER

A petition for rehearing en banc having been filed by the petitioner and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 29, 2003.

FOR THE COURT,
Jan Horbaly
Clerk
Dated: August 22, 2003

Supreme Court, U.S.
FILED
FEB 20 2004
OFFICE OF THE CLERK

(2) (2)

Nos. 03-738 and 03-739

In the Supreme Court of the United States

ALBERT E. BIVINGS, PETITIONER

v.

DEPARTMENT OF THE ARMY

NORMAND LABERGE, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether reports made by federal employees through normal channels as part of their assigned normal job duties are protected disclosures under the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8)(A).

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Waters v. *Churchill*, 511 U.S. 661 (1994)	8
Willis v. *Department of Agric.*, 141 F.3d 1139 (Fed. Cir. 1998)	8
Wisniewski v. *United States*, 353 U.S. 901 (1957)	8

Statutes and regulation:

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*	4
Sikes Act, 16 U.S.C. 670a *et seq.*	3
Whistleblower Protection Act of 1989, Pub. L. No. 101-112, 103 Stat. 16 (5 U.S.C. 1201 *et seq.*):	2
5 U.S.C. 2302 (§ 4)	2
5 U.S.C. 2302(b)(8)	5
5 U.S.C. 2302(b)(8)(A)	2, 6
5 U.S.C. 1221	4
5 U.S.C. 1221(e)(1)	6
5 C.F.R. 1201.118	5

Miscellaneous:

S. Rep. No. 358, 103d Cong., 2d Sess. (1994)	7

In the Supreme Court of the United States

No. 03-738

ALBERT E. BIVINGS, PETITIONER

v.

DEPARTMENT OF THE ARMY

No. 03-739

NORMAND LABERGE, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals in No. 03-738 (Pet. App. 1a) is not published in the *Federal Reporter*, but is *reprinted in* 65 Fed. Appx. 731. The final order of the Merit Systems Protection Board (03-738 Pet. App. 2a-4a), affirming the initial decision of an administrative judge (03-738 Pet. App. 5a-21a), is reported at 92 M.S.P.R. 225 (Table).

The judgment of the court of appeals in No. 03-739 (Pet. App. 1a) is not published in the *Federal Reporter*, but is *reprinted in* 66 Fed. Appx. 204. The opinion of

the Merit Systems Protection Board (03-739 Pet. App. 3a-30a) is reported at 91 M.S.P.R. 585.

JURISDICTION

The judgments of the court of appeals were entered on June 6, 2003. The petitions for rehearing were denied on August 22, 2003 (03-738 Pet. App. 22a; 03-739 Pet. App. 2a). The petitions for a writ of certiorari were filed on November 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are federal employees who seek to challenge the judgments of the court of appeals that affirmed without opinion final orders of the Merit Systems Protection Board (MSPB or the Board). The Board denied petitioners' individual right of action (IRA) appeals filed pursuant to the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-112, § 4, 103 Stat. 32 (5 U.S.C. 2302). The WPA gives the Board jurisdiction to adjudicate claims of reprisals by federal employees who make "any disclosure * * * which the employee * * * reasonably believes evidences * * * a violation of any law, rule, or regulation." 5 U.S.C. 2302(b)(8)(A).

1. a. The petitioner in No. 03-738, Albert E. Bivings, is a Wildlife Biologist for the Department of the Army Forces Command (FORSCOM) Headquarters, Fort McPherson, GA. 03-738 Pet. App. 9a. Petitioner is responsible for assisting FORSCOM installations in achieving compliance with various wildlife management statutes. *Ibid.* Petitioner's responsibilities include identifying areas where compliance could be improved. *Id.* at 17a.

Petitioner filed an IRA appeal with the MSPB claiming that various personnel actions were taken against

him in retaliation for his having made allegedly protected disclosures under the WPA. 03-738 Pet. App. 5a-6a. Specifically, petitioner claims that he brought to the Army's attention alleged violations of the Sikes Act, 16 U.S.C. 670a *et seq.*, as it pertains to the privatization of natural resource management positions, and of a 1992 Jeopardy Biological Opinion relating to a forest burning plan designed to promote the growth of long leaf pines at Fort Stewart, North Carolina. 03-738 Pet. App. 9a.

Following a hearing, an administrative judge dismissed petitioner's appeal, finding that none of the alleged disclosures was protected under the WPA. 03-738 Pet. App. 5a-21a. With respect to the Sikes Act reports, the judge found that petitioner had expressed "differences of opinions and disagreement regarding policy" that "do not constitute whistleblowing," *id.* at 12a; that petitioner "was not disclosing anything that was not a matter of general knowledge," *ibid.*; and that petitioner "certainly could not have had a reasonable belief" that he was reporting violations of law, *id.* at 13a. The judge made similar findings with respect to petitioner's alleged Fort Stewart disclosures. *Id.* at 16a-18a.

The judge additionally found that "it is part of [petitioner's] job responsibilities to identify areas where compliance could be improved and to assist installations in making improvements." 03-738 Pet. App. 17a. The judge observed (*ibid.*) that petitioner's reports therefore were not protected disclosures under the Federal Circuit's decision in *Huffman* v. *Office of Personnel Management*, 263 F.3d 1341, 1351-1355 (2001), which held that the WPA does not cover reports by employees that are made through normal channels as part of the employee's normal assigned duties.

b. The MSPB summarily denied the petition for review of the initial decision. 03-738 Pet. App. 2a-4a.

c. The court of appeals in a per curiam decision, without opinion, affirmed the MSPB's decision. 03-738 Pet. App. 1a.

2. a. The petitioner in No. 03-739, Normand Laberge, is an Environmental Engineer at the Naval Computer and Telecommunications Station Cutler, East Machias, Maine (Cutler). 03-739 Pet. App. 4a. He serves as an Environmental and Natural Resources Program Manager who is responsible for ensuring Cutler's compliance with all applicable federal and state environmental laws and regulations. His major duties include providing "authoritative guidance" to the NCTS Cutler commanding officer and others on "the interpretation of environmental laws, regulations, standards, policies and directive concerning same." *Id.* at 4a, 6a-7a. Petitioner is also responsible for documenting compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 03-739 Pet. App. 14a.

On June 17, 1999, the Navy issued a letter of reprimand to petitioner. 03-739 Pet. App. 5a. Petitioner subsequently filed an IRA appeal with the MSPB pursuant to 5 U.S.C. 1221, arguing that the Navy's action was taken in retaliation for his role in the review of a project to paint certain towers and other structures that are located on environmentally sensitive federal lands. He claimed that he had made the following allegedly protected disclosures under the WPA: (1) informing the Command that it should have notified the Maine Department of Environmental Protection that PCBs had been discovered in the soil surrounding the project site after paint had been stripped from the towers; (2) informing the Command that it should conduct environmental assessments on the project's

effects after it was determined that the PCBs could not be fully contained; and (3) suggesting that Navy should conduct an environmental assessment on the project. 03-739 Pet. App. 6a.

Following a hearing, an MSPB administrative judge issued an initial decision dismissing petitioner's appeal for lack of jurisdiction because petitioner had failed to show that he had a reasonable belief that his disclosures evidenced the wrongdoing described in the WPA, 5 U.S.C. 2302(b)(8). 03-739 Pet. App. 31a-60a.

b. Petitioner filed a petition for review with the full MSPB and on June 14, 2002, the MSPB denied the petition but reopened the case upon its own motion pursuant to 5 C.F.R. 1201.118. The Board affirmed the initial decision, as modified, and dismissed the appeal for lack of jurisdiction under *Huffman*, *supra*, which was decided after the administrative judge had issued his initial decision. 03-739 Pet. App. 3a-9a. The Board concluded that, although petitioner may have reasonably believed that he was disclosing the Navy's violations of environmental laws or regulations in implementing the tower project, the petitioner merely was performing his normal duties as an Environmental Engineer. *Ibid.*

In a separate concurring opinion (03-739 Pet. App. 9a-30a), Board member Slavet stated that she "agree[d] that the evidence established that the [petitioner] made his disclosures through normal channels as part of his normal assigned duties," *id.* at 9a, but that she disagreed with the court of appeals' decision in *Huffman*, *id.* at 12a.

c. The court of appeals in a per curiam decision, without opinion, affirmed the MSPB's final decision. 03-739 Pet. App. 1a.

ARGUMENT

1. Petitioners contend that the Federal Circuit in *Huffman*, *supra*, was incorrect in holding that the WPA does not protect reports of wrongdoing by federal employees acting through normal channels as part of their normal job duties. 03-738 Pet. 8-13; 03-739 Pet. 8-13. That contention lacks merit.

The WPA provides protection to federal employees who make "any disclosure * * * which the employee * * * reasonably believes evidences * * * a violation of any law, rule, or regulation." 5 U.S.C. 2302(b)(8)(A). As the court of appeals in *Huffman* explained, the statutory term "disclosure" does not address the precise issue whether an employee makes a protected report when he is explicitly assigned the job responsibility of reporting government wrongdoing and he reports such wrongdoing through normal channels. 263 F.3d at 1350, 1352. The court thus properly interpreted the term in light of the remedial scheme for federal workers with normal employment claims and Congress's "central purpose" in the WPA "to protect employees who go above and beyond the call of duty and report infractions of law that are hidden." *Id.* at 1352, 1353.[1]

The Act's central purpose is not served where an "employee has, as part of his normal duties, been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, reports that wrongdoing through normal channels." 263 F.3d at

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[1] The *Huffman* court found further support for its conclusion in the related provisions of 5 U.S.C. 1221(e)(1), which govern how an employee can demonstrate that a disclosure was a contributing factor in a personnel action. Those factors appear to presuppose that a report to a distinct supervisor through normal channels is not a "disclosure." See 263 F.3d at 1352 n.4.

1352. For example, "the core purposes of the WPA are simply not implicated by" the reporting of wrongdoing by "[a] law enforcement officer whose duties include the investigation of crime by government employees" or the reporting of wrongdoing by "[e]mployees of an inspector general's office." *Ibid.*

Moreover, the court of appeals in *Huffman* made clear that the WPA *does* protect many disclosures by employees who are responsible for reporting government wrongdoing. The court thus concluded that a protected disclosure includes "the situation in which an employee with such assigned investigatory responsibilities reports the wrongdoing outside of normal channels," as well as "the situation in which the employee is obligated to report the wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties." 263 F.3d at 1354.

Petitioners also are mistaken in faulting the court of appeals in *Huffman* for not giving sufficient weight to the legislative history of the 1994 amendments to the WPA that expresses displeasure with decisions by MSPB administrative judges that had concluded that the Act did not protect disclosure made through normal channels as part of assigned job duties. See S. Rep. No. 358, 103d Cong., 2d Sess. 11 (1994). As the court in *Huffman* explained, "in 1994 the [WPA's] disclosure provisions were not amended," and accordingly "post-en-actment statements made in the legislative history of the 1994 amendment have no bearing on [the court's] determination of the legislative intent of the drafters of the 1978 and 1989 legislation." 263 F.3d at 1354. To the contrary, "it could be viewed as significant that Congress in 1994," aware of prior MSPB decisions, "did not amend the language of section 2302 to address this

issue, thus leaving the matter for judicial resolution under the existing language of the Act." *Ibid.*[2]

2. Petitioners also contend that *Huffman* conflicts with this Court's decision in *Waters* v. *Churchill*, 511 U.S. 661 (1994). 03-738 Pet. 13-17; 03-739 Pet. 13-17. That contention also lacks merit. *Waters* concerned First Amendment protections for speech by governmental employees, and petitioners here have never asserted a First Amendment claim. Moreover, *Waters* does not purport to interpret the WPA, much less purport to address whether reports of government wrongdoing through normal channels as part of the employee's assigned duties is a protected disclosure under the WPA. Rather, *Waters* simply cites the Act for the propositions that arguably "high officials should allow more public dissent by their subordinates," 511 U.S. at 673, and that "the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment," *id.* at 674. Neither of those statements addresses petitioners' interpretation of the WPA.

3. Finally, petitioners claim that they did not report the alleged wrongdoing through normal channels or as

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[2] Petitioners also contend that *Huffman* conflicts with earlier decisions of the Federal Circuit. 03-738 Pet. 6-8; 03-739 Pet. 7-9. That claim lacks merit. Although previous Federal Circuit decisions contained some "conflicting statements in dictum," the Federal Circuit previously in *Willis* v. *Department of Agriculture*, 141 F.3d 1139, 1143 (1998), "specifically held that an employee who makes disclosures as part of his normal duties cannot claim the protection of the WPA." *Huffman*, 263 F.3d at 1352. In any event, any intracircuit conflict would be for the Federal Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

part of their normal assigned job responsibilities. 03-738 Pet. 17-22; 03-739 Pet. 17-22. The court of appeals did not address those fact-bound contentions in its unpublished decisions, and this Court should accordingly decline to address them in the first instance.

In any event, petitioners' contentions are incorrect. As to petitioner Laberge, the MSPB carefully reviewed the record and petitioner's job descriptions, and the Board found that his "actions were within the duties described in his position description," 03-739 Pet. App. 6a, and similarly that he "was investigating and reporting wrongdoing as part of his normal duties through normal channels," *id.* at 7a. That holding was also joined by Board member Slavet in her concurring opinion, which concluded that "the evidence established that the [petitioner] made his disclosures through normal channels as part of his normal assigned duties." *Id.* at 9a; accord *id.* at 12a, 23a.

Review is similarly not warranted with respect to petitioner Bivings. The MSPB summarily rejected the petition for review of the administrative judge's decision. 03-738 Pet. App. 2a-3a. And the administrative judge specifically found that petitioner's alleged disclosures were unprotected for various reasons in addition to the fact that they were made in connection with petitioner's normal job duties.[3] Therefore, even were the Court to accept petitioner's interpretation of the

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[3] The judge found that petitioner expressed "differences of opinion and disagreement regarding policy" that "do not constitute whistleblowing," 03-738 Pet. App. 12a; that petitioner "was not disclosing anything that was not a matter of general knowledge," *ibid.*; and that petitioner "certainly could not have had a reasonable belief" that he was reporting violations of law, *id.* at 13a. Accord *id.* at 16a-18a.

WPA, the court of appeals still correctly affirmed the Board's dismissal of petitioner's appeal.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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